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IN THE

Supreme Court of the United States

October Term, A. D. 1932.

No. [redacted] 12

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

vs.

CONCORDIA FIRE INSURANCE COMPANY,
a corporation,

Appellant.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM.

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MAY IT PLEASE THE COURT:

I.

Considerations involved in the disposition of appellee's motion to dismiss.

At page 6 of its typewritten statement making against the jurisdiction of this Court, counsel for appellee concede that this Court has jurisdiction, but argue that it should not be exercised because in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494 the validity of Section 30 of the Act of 1869 (drawn into question in the instant appeal) was considered by the Court, and therefore the validity of taxes imposed upon appellant and now under review in the instant case should not be considered. The precise question involved in the *Hanover case* was whether a tax imposed upon 100% of the net receipts of a foreign stock fire insurance company, after its admission

to the state of Illinois, was unlawfully discriminatory when domestic stock fire insurance corporations were taxed only upon 30% of the full cash value of their personal property. No other discriminatory features of the net receipts tax under Section 30 were required to be or were decided by this Court, since once having arrived at the conclusion that there was the unlawful discrimination above stated, it was unnecessary to go further. Following its usual practice, the Court reversed the judgment of the Supreme Court of Illinois, and remanded the cause for further proceedings not inconsistent with its opinion.

The Supreme Court of Illinois, in three prior cases involving Section 30, *People* v. *Kent*, 300 Ill. 324; *People* v. *Barrett*, 309 Ill. 53, and *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366, had construed Section 30 to impose an excise tax in the nature of an occupation or business tax for the privilege of doing business in Illinois. It had stated unequivocally that the tax *was not a property tax* and was not subject to the rules of property taxation and that *it was not imposed under the Revenue Act of 1898* (Cahill's Revised Statutes of Illinois, 1931, Chapter 120), but was imposed under the Insurance Act (Cahill's Revised Statutes of Illinois, 1931, Chapter 73). When the mandate from this Court was filed in the Supreme Court of Illinois, that Court filed a new opinion (327 Ill. 590), three justices dissenting. The majority of the Court held that the tax imposed under Section 30 *was not an excise*, occupation or business tax, *but was a property tax*, and that while it arose under the Insurance Act, that Act should be construed in connection with the Revenue Act and that net receipts should be scaled, debased, equalized and in all respects treated like other personal property. The Court expressly overruled the *Kent*, *Barrett* and *Hanover cases* in respect to what it had there said in reference to the nature of the tax. The three dissenting justices were of opinion

that Section 30 of the Act of 1869 was unconstitutional and void. In its last opinion in *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, the Supreme Court of Illinois did not consider or pass upon the unlawful discrimination arising from

(*a*) The exemption from taxation of net receipts in the hands of foreign casualty insurance companies, foreign Lloyds, unincorporated associations and other foreign groups of insurers who were permitted, by the Illinois statutes and decisions, to do a competitive business with foreign stock fire insurance companies in many important classes of risks common to both groups of companies (*Fidelity & Casualty Company* v. *Board of Review*, 264 Ill. 11), whereas the same net receipts in the hands of the foreign stock fire insurance companies were taxed under Section 30;

(*b*) The denial to foreign stock fire insurance companies in Illinois of the right to deduct the losses paid, from their gross receipts, (*National Fire Insurance Company* v. *Hanberg*, 215 Ill. 378) before determining the amount of net receipts subject to tax, when domestic fire insurance corporations doing the same business and receiving the same character of net receipts were permitted to make such deductions, because taxed only upon such net receipts and such other property as remained in their possession on April 1st of each calendar year.

The Supreme Court of Illinois, by its last decision in the *Hanover case*, radically departed from its former pronouncement regarding the nature of the tax arising under and by force of Section 30 of the Act of 1869. It has reversed its position as to the character of the tax from an excise or occupation tax to *a tax on property*. Since its last decision in *Hanover Fire Insurance Company* v.

Harding, the Supreme Court of Illinois, by its opinions and judgments in the instant case and in *People* v. *Franklin National Insurance Company*, 343 Ill. 336 has sanctioned arbitrary discrimination against foreign stock fire insurance corporations and in favor of foreign casualty insurers, incorporated and unincorporated, in the taxation of the same character of property in their hands respectively, *basing such discrimination solely upon the character of the taxpayer*,—that is, whether it is a foreign stock fire insurance corporation or a foreign casualty company, or other foreign insurer, doing the same business in direct competition with foreign fire companies. And it has also sanctioned an arbitrary discrimination in favor of domestic insurance companies by permitting them *to have the benefit of a deduction of their losses paid*, while denying to the foreign stock fire insurance corporations the same deduction.

None of these questions was passed upon by, and some of them were not presented to, this Honorable Court in the *Hanover case*. It is obvious that where only an *excise* tax is under consideration, questions affecting the validity of a *property* tax do not arise. A case involving an occupation tax on net receipts of a foreign corporation, as against an equivalent property tax on 30% of the net receipts of a domestic corporation, cannot and does not present the questions arising on the present record. In addition, the *Hanover case* involved a tax only for the year 1923, while the instant appeal involves a tax for each year from 1923 to 1927 inclusive and raises constitutional questions affecting the validity of such subsequently imposed taxes which could not be and were not presented in the *Hanover case*. Even without appellee's concession that this Court has jurisdiction, the difference in the records of the *Hanover case* and this case and the changes of opinion by the Supreme Court of Illinois since the decision of the *Hanover case* as to the essential nature of the tax arising under

Section 30 create new and different questions, requiring this Court to assume and retain jurisdiction.

Appellee refers to *King* v. *West Virginia*, 216 U. S. 92, and *Leonard* v. *Vicksburg Railroad Co.*, 198 U. S. 416, to the point that where this Court has considered whether a law violates the Fourteenth Amendment, a second appeal or writ of error involving the validity of the same law will not be considered. An examination of these cases shows that they have no bearing upon the disposition of the instant motion. The *King case* involved a second attempt on the part of the plaintiff in error to obtain a review of the constitutionality of an act which had already been sustained by this Court on a prior review allowed the same plaintiff in error. The essential point of distinction rests in the fact that in the *Hanover case* the validity of Section 30 was not sustained, but, on the contrary the tax assessed under it was held to be invalid. In the *Leonard case*, the appeal was dismissed on the familiar principle that the judgment of the State Supreme Court could be sustained on a non-federal ground and that therefore this Court would not review the error assigned. No such principle applies to the case at bar, and as the appellee concedes, this Court has jurisdiction to determine whether Section 30 of the Act of 1869 and the taxes imposed thereunder violate the rights of appellant under the Fourteenth Amendment, the State Supreme Court having passed upon and denied appellant's contention that Section 30 of the Act of 1869 and the taxes imposed thereunder were violative of the guaranties afforded by the Fourteenth Article of Amendment to the Constitution of the United States. This record calls for determination of the validity of taxes levied under Section 30 of the Act of 1869, *now construed as a property tax*, and, therefore raising new questions not considered in the *Hanover case*. The motion to dismiss has no basis and should be denied.

II.

Considerations involved in the disposition of appellee's motion to affirm.

There are involved on the present record the following substantial questions:

1. The constitutionality of the construction and application of Section 30 of the Act of 1869 by the Supreme Court of Illinois, under which appellant is required to return and be assessed upon all net receipts derived from insuring against the risks of fire, marine and inland navigation, when domestic insurance companies are exempted from the payment of taxes upon similar net receipts derived by them from the transaction of competitive business with appellant upon the same risks and in the same territory in Illinois;

2. The constitutionality of the construction and application of Section 30 of the Act of 1869 by the Supreme Court of Illinois, denying to appellant the right to deduct its paid losses from gross receipts in determining net receipts, when competing domestic fire insurance companies are in fact taxed only upon the remainder of their receipts after the deduction of their losses;

3. The constitutionality of the construction and application of Section 30 of the Act of 1869 by the Supreme Court of Illinois, exempting foreign casualty insurance corporations, foreign Lloyds, foreign unincorporated associations, mutuals, reciprocals, and other groups of individuals from taxation under Section 30, when such competitors are by the statutes of Illinois permitted to and do compete directly with appellant in insuring against such hazards as sprinkler

leakage, tornado, hail, windstorm, earthquake, bombardment, invasion, riot, civil war or commotion, military or usurped power, explosion (other than steam boiler) and insuring automobiles against various hazards;

4. As to the specific tax imposed under Section 30 for the tax year 1927, the following additional questions arise:

(*a*) The validity of the assessment made for the tax year 1927 by the Board of Review of Cook County, upon the sole basis of an estimate made by one Herman B. Seeley, a tax ferret, who at the time he made such estimate for assessment of the net receipts of appellant had a direct contingent financial interest, by contract, in the amount of taxes to be collected from appellant, and stood to profit thereby;

(*b*) The constitutional inequality of the assessment made by the Board of Review against appellant for the tax year 1927, due to the failure of the Board of Review to debase appellant's estimated receipts to 60% of such estimated value; all other property in Cook County being debased to 60% of its full, fair cash value as its full value for purposes of assessment.

Arbitrary discrimination in favor of domestic stock fire insurance companies and foreign casualty insurers.

The present appeal again raises, from new and different angles, the constitutional validity of the construction and application by the Supreme Court of Illinois of Section 30 of the Act of 1869, entitled "An Act to incorporate and to govern foreign fire, marine and inland navigation insurance companies doing business in Illinois." In *Han-*

over Fire Insurance Company v. *Harding*, 272 U. S. 494, this Court held that the tax imposed by said section, treated as a privilege or occupation tax (as the Supreme Court of Illinois treated it in *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366), was invalid because unlawfully discriminatory. It is settled by that decision that when a foreign stock fire insurance company pays its privilege tax or admission fee to the State of Illinois, after admission, the burden of taxation for revenue imposed upon it must be no more onerous than that placed upon competing insurance companies insuring against the same hazards. This Court, in so deciding, asserted that, treating the tax in question as an occupation tax, the taxation of net receipts on a basis higher than the taxation of other property in Cook County and upon a basis higher than that imposed upon domestic insurers on kindred property violated the rights of the insurance company, contrary to the Fourteenth Amendment. Upon the coming down of the mandate from this Court in the *Hanover case*, the Supreme Court of Illinois, in *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, overruled its prior decisions in *People* v. *Kent*, 300 Ill. 324, *People* v. *Barrett*, 309 Ill. 53 and in *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366, and four members of the court of seven held that the tax imposed was not an excise, privilege or occupation tax, but was a property tax and that its constitutionality could be saved by holding that net receipts should be scaled, debased and equalized as all other personal property and taxed at the same rate. Three members of the Court were of opinion that no valid tax could be imposed under Section 30.

In the face of such vacillation and changes in opinion on the part of the Supreme Court of Illinois, appellee argues that acquiescence in the tax for many years on the part of some insurance companies and an alleged settle-

ment by 190 other insurance companies of their net receipts taxes after the decision of the *Hanover case* by this Honorable Court, has a bearing upon the validity of taxes in question. The protracted litigation involving the application and validity of Section 30 in the state courts and in this Court is sufficient answer to this argument.

Appellee seems to contend that the constitutional validity of Section 30 at the time that it was enacted is in question. This is not so. The validity of taxes assessed under that Section, as affected by subsequent decisions of the Supreme Court of Illinois to which we shall refer, is here involved. In 1869 fire insurance companies were permitted to engage in no business except insuring against the hazards of fire, marine and inland navigation. Insurance by fire insurance companies against such hazards as sprinkler leakage, hail, earthquake, lightning, vehicle, theft and collision, rain and crop insurance, riot and civil commotion was then unauthorized. By various amendments to the statutes of Illinois, fire insurance companies were from time to time permitted to write additional risks covering the various classes above described and many others. In none of such amendatory legislation was there any reference to the payment of taxes upon the net receipts of such duly authorized classes of insurance under Section 30. By the Act of 1925 (Cahill's 1931 Revised Statutes of Illinois, Chapter 73, Section 171), all of the classes of hazards against which fire insurance companies might insure were collected and stated, without any specific requirement as to payment of taxes upon the net receipts derived from writing such hazards. In the instant case, the Supreme Court of Illinois held, following the decision of this Court in *Hanover Fire Insurance Company* v. *Harding*, that net receipts derived from all such additional classes were subject to tax.

Up to 1919, there was no privilege tax statute in Illinois. Prior to the decision in *People* v. *Kent*, 300 Ill. 324, no occa-

sion had arisen requiring that Court to consider the nature and operation of the tax imposed by Section 30. On the contrary, in all of the previous decisions of that court affecting the tax under Section 30, it was tacitly assumed (and in that case expressly stated) that the basis of the tax was the consent given by the State of Illinois to a foreign fire insurance company to enter and transact business. True, in one case (*People* v. *Cosmopolitan Insurance Company*, 246 Ill. 442) it was said that net receipts were personal property, but the only point decided was that net receipts might be classified as personal property by the assessing officers. No constitutional question was presented. Prior to the decision of this Court in the *Hanover case*, net receipts were treated differently in different counties in Illinois. In most of the counties they were not returned or taxed at all. In other counties they were assessed and taxed like other personal property.

In the year 1905, the Supreme Court of Illinois in *National Fire Insurance Company* v. *Hanberg*, 215 Ill. 378, held that what constituted "net receipts" under Section 30 was a question of law and that foreign fire insurance corporations were not authorized to deduct their paid losses in ascertaining their net receipts and making their returns for taxation. The case involved only the meaning to be imported into Section 30 and no constitutional question was raised upon the record. Since no federal question was raised, naturally there was no basis for review by this Court.

In 1914, the Supreme Court of Illinois in *Fidelity and Casualty Company* v. *Board of Review*, 264 Ill. 11, held that foreign casualty corporations authorized to do business in Illinois, in direct competition with foreign fire insurance corporations as to certain hazards, were not taxable under Section 30 upon net receipts derived from insuring such hazards. The ground of the decision was that there was nothing in the statute authorizing casualty cor-

porations to do business in Illinois that imposed any net receipts taxes as a condition for such permission. No fire insurance corporation was a party to that suit. The decision was made at a time when there was no privilege tax statute in force.

It was not until the Supreme Court of Illinois first announced in 1921 that net receipts of foreign fire insurance corporations should be taxed at 100% of their full value, whereas other property was taxed at 30% of its full value, that the question of the constitutionality and the construction of Section 30 by that court became the subject of federal review. Thus the argument that Section 30 was valid when passed has no relevance here. The decisions of the Supreme Court of Illinois, denying to foreign fire insurers the right to deduct losses from their gross receipts while permitting domestic fire insurers so to do and in permitting foreign casualty insurers to compete directly with foreign fire insurers and to pay no tax has resulted in such a lack of constitutional uniformity as to render any tax now imposed under Section 30 unconstitutional.

It was stipulated, as part of the record herein, that during the tax years in question foreign casualty companies and other foreign insurers and groups of insurers, including Lloyds and unincorporated associations, competed directly with appellant in writing the various risks which appellant was authorized to and did write in Illinois, and paid *no* taxes on their net receipts derived from such competitive business. These facts, being proved by stipulation, the constitutional questions, framed as above set forth, arise upon the record in the case at bar. This stipulation disposes of appellee's contention that the record does not show the extent of discrimination. In urging upon the Court that the record does not show the amount of taxes paid by casualty companies (Point 4 of motion to affirm) counsel for appellee apparently overlooked the admission by stipula-

tion that foreign casualty insurers were not assessed or taxed *at all* upon their net receipts derived from insuring against the same hazards during the years in question. Therein lies the discrimination complained of.

The annual reports of the Superintendent of Insurance prepared under the authority of the state show the direct competition between casualty and fire insurers in Illinois insuring against the same hazards. Thus for example, total premiums received by fire companies for insuring against the hazard of sprinkler leakage for the years 1924 to 1927 were $7,388,740 and of casualty companies insuring against the same hazard $3,529,175.

The premium rate includes such items as are necessary to cover taxes imposed upon the companies by the several states and municipalities. Consequently, all of the foreign groups of insurers who do a competitive business with appellant at the same premium rate and on the same risks and under the same conditions of risk are able to make an additional profit over and above what appellant can make, equal to that part of the premium which they collect and which they do not have to pay out as a tax under Section 30.

The Supreme Court of Illinois in its decisions in *People v. Franklin National Insurance Company*, 343 Ill. 346, and the instant case, conceded the discrimination but sustained the tax upon the theory that the classification of insurers made by the legislature was a reasonable one; in other words, that a classification of insurers that taxed fire insurance companies upon their net receipts from insurance effected against the hazards of lightning, earthquake, windstorm, cyclone, tornado, hail and other like risks and exempted foreign casualty companies from taxation upon their net receipts from similar insurance was a reasonable one. Many of the cases cited by the Supreme Court of

Illinois in its decisions sustaining the classification as reasonable, were pressed upon this Court in *Hanover Fire Insurance Company* v. *Harding, supra,* and were there held inapplicable.

This Court has many times held that a classification based upon the character of the owner of the property sought to be taxed, is unreasonable and arbitrary. Thus, in *Hanover Fire Insurance Company* v. *Harding, supra,* appellee urged upon the Court the contention that a classification into foreign and domestic fire insurers, insuring the same risks, was a reasonable one. This contention was rejected. In *Quaker City Cab Company* v. *Pennsylvania,* 277 U. S. 389, this Court held that a classification imposing a tax upon gross receipts of corporations and exempting from taxation the same kind of gross receipts in the hands of individuals engaged in the same business, was unreasonable and arbitrary. The classification in the case at bar is subject to the same vice condemned in the decisions just cited. The premium derived by foreign fire insurance companies from insuring a building against the hazard of sprinkler leakage is subject to tax; the same premium received by a foreign casualty company insuring the same building against the same hazard, is exempt from tax. The classification thus rests entirely upon the character of the entity receiving the premium. A foreign fire insurance company is taxed simply because it is a fire insurance company; a casualty company is exempt only because it is a casualty company. Such a distinction is plainly arbitrary.

Appellee says (Point 3 of motion to affirm) that to hold the discrimination here established unlawful would compel the Court to overrule a long line of prior decisions, and many cases are cited. The same argument was made and practically the same cases cited to this Court in *Hanover Fire Insurance Company* v. *Harding, supra,* and yet the Court had no difficulty in holding the discrimination arbitrary and in distinguishing the cases cited. The same situa-

tion exists in the case at bar, and the disposition of the questions presented by this record call for no reconsideration or overruling of the decisions cited by appellee.

Appellee says (Point 4 of motion to affirm) that if it is unjust discrimination to tax foreign fire companies on their net receipts while exempting foreign casualty companies from taxation on net receipts derived from insuring the same risks that it would be the act authorizing casualty companies to transact such business rather than Section 30 of the Act of 1869 which would be unconstitutional. This is not so. This Court has many times said that a taxpayer discriminated against is not required to take steps to require his competitor to pay; he may stand upon the invalidity of the arbitrary discrimination imposed upon him. *Lawrence* v. *State Tax Commission*, 286 U. S. 276. And so here. The exemption of casualty insurers from a tax on net receipts on business written in direct competition with fire companies on the same hazards renders taxes imposed upon the latter under Section 30 invalid. The section itself may not be invalid, but *so long as the state permits arbitrary discrimination in favor of casualty insurers*, so long is any tax assessed under Section 30 invalid.

Domestic fire insurance corporations are taxed upon such net income or property as remains to them as of April 1st in each tax year after the payment of all of their losses and expenses. This assessment is a property tax. Foreign fire insurance corporations, under the decision of the Supreme Court of Illinois in *National Fire Insurance Company* v. *Hanberg*, 215 Ill. 378, are forbidden to deduct their losses paid in arriving at their net receipts. The loss ratio in Cook County for the years in question was not less than forty-five per cent of the gross receipts for each of said years. Foreign fire insurance corporations pay taxes upon all property, real and personal, that they have in the state on April 1st of each year, including their cash in bank and such intangibles as are present in the

state. In addition, foreign fire corporations pay various other taxes, including salvage corps tax, fire marshal's tax, and fire department tax exacted by municipalities having fire departments (not more than 2% of their gross premiums in each of such municipalities). Domestic fire insurance companies pay no taxes, either upon their gross receipts or their net receipts, because they are taxed only upon what property or money they have left at the end of each tax year. They deduct their losses paid, which amount by stipulation to not less than forty-five per cent of each premium dollar that they receive. There is, therefore, an admitted forty-five per cent discrimination in taxation against foreign fire insurance corporations and in favor of domestic fire insurance corporations. This Court, having held in the *Hanover case*, that when foreign fire insurance corporations are admitted to do business in the state, they must then be placed upon a level with domestic fire insurance corporations as to taxation for revenue, it becomes a matter for decision whether this discrimination of forty-five per cent is an unlawful and arbitrary one. No statute in Illinois can be pointed out that makes the net receipts tax under Section 30 a commuted tax in lieu of any other form of taxation. On the contrary, counsel for appellee admit that foreign fire insurance corporations must pay taxes upon all property that they own in Illinois on April 1st of each tax year.

Invalidity of 1927 tax by reason of assessment made by Board of Review entirely on basis of estimate prepared by Herman B. Seeley who had a direct financial interest in the proceeds of taxes assessed on the basis of his estimate.

The instant action was instituted in the Circuit Court of Cook County, Illinois, to recover taxes alleged to be due for each of the tax years 1923 to 1927 inclusive, under an assessment made for all of said years at one time by the Board of Review of Cook County in the year 1928. The

Supreme Court of Illinois rejected the assessment so made as to the tax years 1923 to 1926, inclusive, but sustained it for the year 1927. The assessments were spread upon the tax books by the Board of Review of Cook County, solely upon the basis of figures prepared by one Herman B. Seeley. Seeley was not in the employ of the Board of Review of Cook County, but on the contrary had a direct interest in two or more contingent fee contracts held by two different law firms in the City of Chicago. One of these contracts in which Seeley had a one-third interest provided that the lawyers holding it should receive 33⅓% on net receipts taxes collected for years from 1869 up to 1918, and on years after that of 15%. Seeley also claimed a direct interest in another contract entered into between another law firm and the County of Cook, with reference to the collection of the same taxes. On the trial of the instant case he testified that he had already received $12,000.00 under one contract, and $4,000.00 under the other, and if recovery in the case at bar were had, he would receive a portion of the proceeds. The Board of Review of Cook County relied entirely upon the "estimate" made up by Seeley, and extended his figures on the tax books without any administrative or judicial consideration of their own. The Circuit Court of Cook County held that the action of the Board of Review in assessing the tax in question upon the basis of figures prepared for it by a tax ferret, who had a direct financial interest in the amount of taxes collected under the assessment, rendered the tax fraudulent and the tax extended thereon void.

Although the contention was pressed upon the Supreme Court of Illinois by appellant that to enforce a tax based upon such an assessment would deprive appellant of its property without due process of law, contrary to the Fourteenth Article of Amendment to the Constitution of the United States, the Court did not pass upon the question, but contented itself with mere general, and in many respects

inaccurate, statements as to the relationship of Seeley to the assessment of the tax in question. Thus the opinion of the Court refers to Seeley as an assistant corporation counsel. The record shows he was not. The Court also says in its opinion that Seeley's estimates and computations were shown to the members of the Board of Review having charge of insurance assessments, at whose directions, after being checked up and verified, they were placed upon the assessment roll, and afterwards approved by the entire board. This is an inaccurate statement. The record shows that Charles V. Barrett, the member of the Board of Review in charge of insurance assessments, directed Lauer, the chief clerk of the Board of Review, to spread Seeley's estimates on the tax books as the estimate of the net receipts of the insurance companies for the years in question. There was no checking up and verification, except by Seeley's own stenographer, who took part in the clerical work of making up the list of assessments. The record further shows that the figures prepared by Seeley were placed upon the books by the Board of Review without any consideration whatsoever by the Board. The Supreme Court further said in its opinion that no evidence was introduced by appellant to show the inaccuracy of Seeley's figures, or that the assessment made by the Board of Review was in excess of the actual net receipts. This likewise is contrary to the record. The appellant introduced evidence that for the year 1927 its actual net receipts in Cook County amounted to $76,291.00; Seeley estimated them for the same year at $121,550.00, and his estimate was placed upon the tax books by the Board of Review. In view of this uncontradicted evidence of an over-assessment of almost 50%, the statement of the Supreme Court that no evidence was introduced by appellant to show that the estimate made for the year 1927 was in excess of appellant's net receipts is palpably erroneous. In determining whether or not appellant was deprived of its property without due process of law by the assessment of the tax upon the basis of the estimate prepared by

Seeley, who had a direct financial interest in the amount of the taxes to be derived from the assessment so made, this Court will make its own examination of the facts appearing on the record.

Upon this record, the question is presented, whether a tax assessed solely upon figures prepared by one having a direct financial interest in the collection of the tax in exact proportion to the amount thereof, is valid within the guaranties afforded by the Fourteenth Article of Amendment to the Constitution of the United States. We urge and shall contend that a tax assessed and levied under such circumstances is void. The action of taxing bodies in assessing a tax is judicial in nature. *Jarman* v. *Board of Review*, 345 Ill. 248; *Allwood* v. *Cowen*, 111 Ill. 481. It is fundamental to the concept of due process of law that where judicial functions are to be exercised, all who are interested are to be excluded from taking any part therein. Thus, in *Tumey* v. *Ohio*, 273 U. S. 510; 71 L. Ed. 749, this Court reversed a judgment of the Supreme Court of Ohio, which had held proper the conviction of Tumey in a trial before the Mayor of the Village of North College Hill, Ohio, because, under the Ohio law, the Mayor had a direct financial interest in the fines imposed by him. The Court said:

> "That officers acting in a judicial or *quasi* judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule. *Dimes* v. *Grand Junction Canal*, 3 H. L. Cas. 759, 10 Eng. Reprint, 301; *Gregory* v. *Cleveland, C. & C. R. Co.*, 4 Ohio St. 675; *Pearce* v. *Atwood*, 13 Mass. 324; *Taylor* v. *Worcester County*, 105 Mass. 225; *Kentish Artillery* v. *Gardiner*, 15 R. I. 296; *Moses* v. *Julian*, 45 N. H. 52, 84 Am. Dec. 114; *State, Winans, Prosecutor* v. *Crane*, 36 N. J. L. 394; *Peninsular R. Co.* v. *Howard*, 20 Mich. 18; *Stockwell* v. *White Lake*, 22 Mich. 341; *Findley* v. *Smith*, 42 W. Va. 299, 26 S. E. 370; Nettleton's Appeal, 28 Conn. 268; Cooley, Const. Lim. 7th Ed. pp. 592, *et seq.*"

In *Dimes* v. *Grand Junction Canal*, 3 House of Lords Cases, 759, Lord Campbell said (page 793):

> "We have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

The case at bar falls within the rule laid down in the above cited cases. The uncontradicted facts disclose that the Board of Review delegated to Seeley complete charge and control over the matter of making the assessments of so-called omitted net receipts; that Seeley had an interest in contingent fee contracts entered into between certain lawyers and the taxing bodies; that the amount which Seeley was to receive through the contingent fee contracts was directly proportional to the amount of the assessment to be made; that thereupon Seeley to further his own self-interest and the interest of his contingent fee associates "estimated" the net receipts of the insurance companies for the years in question; that in making his estimate for the year 1927 he deliberately disregarded the rule of uniformity laid down by this Court in *Hanover Fire Insurance Company* v. *Harding, supra,* and did not scale and debase the net receipts as all other personal property was scaled and debased, which would have materially reduced the amount of contingent compensation; that the Board of Review adopted Seeley's figures and without any consideration of their own, directed that they be spread on the

tax books, and they were so spread, and the tax so extended.

In connection with the pecuniary incentive of Seeley to estimate the taxes at the highest possible amount, we respectfully refer this Court to the affidavit filed by the same Herman B. Seeley in this Court in *Hanover Fire Insurance Company* v. *Carr*, 272 U. S. 494, in support of the motion to advance that cause. There he swore that the foreign fire insurance companies were then (1926) indebted for taxes in the amount of $10,000,000.00, and that taxes were accruing at the rate of $2,000,000.00 per annum. Needless to say no mention was made in such affidavit of the interest of Seeley and his associates in these amounts claimed to be due. The figures so recited in the affidavit made in this Court suffice to show the high stakes for which Seeley and his associates were playing, and suggest the necessity for protecting the taxpayer against the collection of a tax based on an "estimate" made by one having a direct financial interest in the amount of the tax.

Invalidity of 1927 tax by reason of failure of Board of Review to debase estimate of appellant's net receipts as all other personal property in Cook County was debased.

Not only was the tax assessed for the year 1927 invalidated by the direct financial interest of Seeley, but the failure of the Board of Review of Cook County to scale, debase and equalize the net receipts of appellant for said year, as all other personal property was scaled, debased and equalized, as required under the repeated decisions of this Court, requires correction here. The evidence shows that during the year 1927 and for many years prior thereto, the Board of Assessors of Cook County and the Board of Review of Cook County, in determining the full value of personal property in Cook County, took 60% of the actual full, fair cash value as the full value for

assessment purposes. This was done as to all other property, but no such scaling and debasing was afforded the net receipts of the appellant after their "estimate" by Seeley. The record shows that the net receipts of the appellant were estimated by the Board of Review at $121,550.00. This estimate was not scaled and debased to 60% as all other personal property in Cook County was scaled and debased but was placed upon the tax books in the full amount of the estimate, that is, $121,550.00. The action of the Board of Review in placing upon the tax books an assessment at 100% of the net receipts of the appellant was in direct violation of the rule laid down by this Court in *Hanover Fire Insurance Company* v. *Harding, supra.* Appellee contends (Point 5 of motion to affirm) that since the appellant made no return of its net receipts as called upon to do by the Board of Review, that therefore the Board of Review was justified in making the estimate of net receipts upon the information available. This does not meet the issue presented by the tax in question. Assuming that the Board of Review was justified in making an estimate of the net receipts, still, having made the estimate, it was required to scale and debase that estimate to 60% of the amount thereof as the valuation of all other personal property in Cook County was scaled and debased for purposes of assessment. Appellee also contends (Point 4 of motion to affirm) that no proof was made by appellant of its net receipts for the year 1927. This is not so. The secretary of appellant testified that the actual net receipts of appellant in Cook County for 1927 was $76,921. The estimate made by the Board of Review was $121,550. The right of the Board of Review to make the estimate is not here in question; but having made it, they were required to scale and debase the estimate as all other personal property was scaled and debased. Appellee says (Point 6 of motion to affirm) that the record shows a debasement to 75% by the Board of Review. We have already pointed

out in our jurisdictional statement that for the year 1927 the Board of Review did not debase to 60% their estimate of net receipts but spread them at full value. However, on the basis of appellee's own admission there was a discrimination to the extent of at least 15% against appellant in 1927; a discrimination sufficient in itself to require correction by this Court like that made in *Hanover Fire Insurance Company* v. *Harding*. The discrimination against the appellant is manifest. The tax imposed under the assessment made by the Board of Review on the full 100% basis and sustained by the Supreme Court, amounted to $5,895.19. If the assessment of the Board of Review had been debased to 60% as required under the decision of this Court in *Hanover Fire Insurance Company* v. *Harding, supra,* and other decisions, of like import, the tax (by stipulation of record) would have been $3,537.10. The constitutional invalidity of the 1927 assessment alone, apart from any other questions presented by this record, calls for a review by this Honorable Court.

CONCLUSION.

We have briefly stated the various questions arising upon this record which need further argument and full consideration by this Court. They are all here for review upon this record, and regardless of ultimate disposition, we respectfully submit that their further consideration is required.

We respectfully ask that the motion to dismiss or affirm be denied.

Respectfully submitted,

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